

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ANGEL PABON,	:	CIVIL NO. 3:07-CV-1613
	:	
Plaintiff	:	(Judge Munley)
	:	
v.	:	(Magistrate Judge Smyser)
	:	
K. CHIMIELEWSKI, et al.,	:	
	:	
Defendants	:	

REPORT AND RECOMMENDATION

On September 4, 2007, the plaintiff, a state prisoner proceeding *pro se*, commenced this 42 U.S.C. § 1983 case by filing a complaint. The complaint raised due process, double jeopardy, access to the courts, and Eighth Amendment claims.

By an Order dated September 23, 2008, Judge Munley granted the defendants' motion to dismiss the complaint with respect to the double jeopardy and Eighth Amendment claims. Judge Munley granted the plaintiff leave to file, within thirty days, an amended complaint properly pleading an access to the courts claim and a due process claim. Judge Munley

indicated that if the plaintiff did not file an amended complaint that properly asserts such claims the motion to dismiss will be granted on those claims as well and the case will be closed. Judge Munley remanded the case to the undersigned for further proceedings.

On October 3, 2008, the plaintiff filed a Notice of Appeal of the Order of September 23, 2008.¹ By an Order dated December 4, 2008, the United States Court of Appeals for the Third Circuit dismissed the plaintiff's appeal based on the plaintiff's failure to pay the requisite filing fee as directed.

In the meantime, the plaintiff requested and received an extension of time to file an amended complaint. On October 28, 2008, the plaintiff filed an amended complaint and a document entitled "Memorandum of Law to Amended

¹ The plaintiff indicated on the Notice of Appeal that it was to be held in abeyance pending an amended petition. There is no provision of which we are aware that allows a litigant to file a notice of appeal but hold the appeal in abeyance.

Complaint.” Also on October 28, 2008, the plaintiff filed a motion to vacate the Order of September 23, 2008 and a brief in support of that motion.

On October 29, 2008, the defendants filed a motion, along with a brief in support, to strike the plaintiff’s motion to vacate and the plaintiff’s amended complaint. The defendants assert that the plaintiff’s motion to vacate and the plaintiff’s amended complaint should be stricken because they were filed after the plaintiff filed his notice of appeal and, therefore, after this court was divested of jurisdiction by the appeal.

On November 4, 2008, the plaintiff filed a motion to strike the defendants’ motion to strike. The plaintiff indicates in this motion that he intended that his notice of appeal be held in abeyance pending the filing of an amended complaint.

By a separate order, we have denied both the defendants' motion to strike and the plaintiff's motion to strike. We noted that since the plaintiff's appeal is no longer pending there is no practical reason to strike the plaintiff's filings. We have, however, stricken the plaintiff's "Memorandum of Law to Amended Complaint" since a memoranda or brief in support of a complaint is not a proper pleading.

We now recommend that the plaintiff's motion (doc. 46) to vacate the Order of September 23, 2008 be denied because the plaintiff has not presented a sufficient reason for the court to vacate or reconsider that order. We also recommend that the case be remanded to the undersigned for further proceedings.

/s/ J. Andrew Smyser
J. Andrew Smyser
Magistrate Judge

Dated: January 8, 2009.